

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1407

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

RONALD BELL,

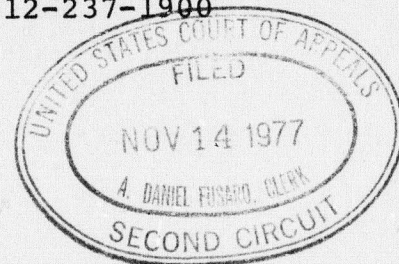
Defendant-Appellant.

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On Appeal from the United States District Court
For the Eastern District of New York

BRIEF FOR RONALD BELL

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TABLE OF CONTENTS

	Page
Statement of Issues	1
Statement of Case	2
I. Nature of Case	2
II. Course of Proceedings	2
III. Dispositions Below	2
IV. Statement of Facts	3
Argument:	
Point I - The post-indictment, pre-arraignment statement by Bell was unlawfully obtained and its use at trial was reversible error	5
A. Bell should have been arraigned promptly when brought to the E.D.N.Y. courthouse rather than being detoured to the U.S. Attorney's office for interrogation; and under the circumstances of this interrogation, any statements made by Bell, while they could be used to provide information against co-defendants, they could not be used against Bell himself	6
B. Bell had an absolute right to counsel during his interrogation; any waiver of his right to counsel, without the advice of counsel, under the circumstances surrounding this case, was a meaningless waiver	11
C. The Government failed to meet its "heavy burden" in proving a waiver of rights	15
Point II - The trial court erred in charging the jury that it could consider defendant Bell's prior bank larceny with regard to proving Bell's identity in the instant case	17
Point III - Both of the preceeding points constitute reversible error	19
Conclusion	21

TABLE OF CASES

	Page
<u>Brewer v. Williams</u> , ___ U.S. ___, 97 S.Ct. 1232 (1977)	13,16
<u>Mallory v. United States</u> , 354 U.S. 449 (1957)	10
<u>Massiah v. United States</u> , 377 U.S. 201 (1964)	8,12,11,14
<u>McNabb v. United States</u> , 318 U.S. 332 (1943)	10
<u>People v. Arthur</u> , 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1963)	15
<u>People v. Hobson</u> , 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976)	15
<u>People v. Lopez</u> , 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825 (1971), <u>cert. denied</u> , 404 U.S. 840	14
<u>People v. Ramos</u> , 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976)	15
<u>Spano v. New York</u> , 360 U.S. 315 (1959)	7,9,11,13,16,19,20
<u>United States v. Anderson</u> , 523 F.2d 1192 (5th Cir.1975)	8
<u>United States v. Cookston</u> , 379 F.Supp. 487 (W.D.Tex.1974)..	8,10
<u>United States v. Duval</u> , 537 F.2d 15 (2d Cir. 1976)	21
<u>United States v. Garcia</u> , 377 F.2d 321 (2d Cir.1967)	13
<u>United States v. Jakakas</u> , 423 F.Supp. 564 (E.D.N.Y.1976)	16
<u>United States v. Johnson</u> , 467 F.2d 630 (2d Cir. 1972), <u>cert.</u> <u>denied</u> , 410 U.S. 932 and 413 U.S. 920	10
<u>United States v. Kaufman</u> , 453 F.2d 306 (2d Cir.1971)	18
<u>United States v. Marrero</u> , 450 F.2d 373 (2d Cir.1971), <u>cert.</u> <u>denied</u> , 405 U.S. 933 (1972)	10
<u>United States v. Massimo</u> , 432 F.2d 324 (2d Cir.1970)	7,8,14

	Page
<u>United States v. Ortega</u> , 471 F.2d 1350 (2d Cir. 1972), <u>cert. denied</u> , 411 U.S. 948	10
<u>United States v. Panepinto</u> , 430 F.2d 613 (3d Cir.1970), <u>cert. denied</u> , 400 U.S. 949	18
<u>United States v. Satterfield</u> , 417 F.Supp. 293, modified, 417 F.Supp. 303, <u>aff'd</u> , 558 F.2d 655 (2d Cir.1976)	9,13,14,16,17
<u>United States v. Torres</u> , 519 F.2d 723 (2d Cir.1975), <u>cert. denied</u> , 423 U.S. 1019	18
<u>United States ex rel. Lopez v. Zelker</u> , 344 F.Supp. 1050 (S.D.N.Y. 1962), <u>aff'd</u> , 465 F.2d 1405, <u>cert. denied</u> , 409 U.S. 1049 ..	13,14,15,16
<u>United States ex rel. O'Connor v. New Jersey</u> , 405 F.2d 632 (3d Cir.1969), <u>cert. denied</u> , 395 U.S. 923	13

STATUTES

18 U.S.C. §3501	9,10
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OTHER AUTHORITIES

Richardson, <u>On Evidence</u> , §180 (10th ed.1973)	18
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STATEMENT OF ISSUES

- I. Whether the post-indictment, pre-arraignment statement by the defendant Bell was unlawfully obtained and whether its use at trial was reversible error;
 - A. Whether Bell should have been arraigned promptly when brought to the E.D.N.Y. courthouse rather than being detoured to the U.S. Attorney's office for interrogation; and whether, under the circumstances of this interrogation, any statements made by Bell could be used against him;
 - B. Whether Bell had an absolute right to counsel during his interrogation; and whether his waiver of the right to counsel, without the advice of counsel, was meaningful;
 - C. Whether the Government met its "heavy burden" in proving a voluntary waiver of rights.
- II. Whether the trial court erred in charging the jury that it could consider Bell's prior bank larceny with regard to proving Bell's identity in the instant case.
- III. Whether the preceeding points constitute reversible error.

STATEMENT OF CASEI. Nature of Case:

The appellant, Ronald Bell, and his co-defendant, Gary Graham, were tried in the Eastern District of New York under an indictment charging violations of 18 U.S.C. §§ 2, 371, 2113(a) and 2113(d), arising out of the alleged robbery of a bank in Westbury, New York, on February 9, 1976.

II. Course of Proceedings:

On June 20th and 21st of 1977, a suppression hearing was held before Judge Bramwell with regard to the respective statements of the co-defendants. [References to the transcript of that hearing will be indicated by "Hearing."]

From July 25th through July 29th, 1977, the defendants were on trial before Chief Judge Jacob Mishler. [References to the transcript of the trial will be indicated by "Trial."]

III. Dispositions Below:

On June 21, 1977, Judge Bramwell denied the defendants' suppression motions from the bench; a written opinion was issued on July 1, 1977 (see Appendix).

On July 29, 1977, Bell was found guilty on Count I

(conspiracy) and Count III (bank robbery by use of a dangerous weapon). The co-defendant, Graham, was found guilty only on Count I.

On September 16, 1977, Bell was sentenced to five years on Count I to run concurrently with fifteen years on Count III; to run consecutively to his state sentence of 1 1/2 to 3 years; to run concurrently with any time owed for his violating parole on a prior bank larceny conviction. Also, on this date, Bell's motion to set aside the verdict was denied from the bench, without oral or written opinion.

IV. Statement of Facts:

While Bell was incarcerated in a New York State correctional facility pursuant to a 1 1/2 to 3 year sentence, he requested a hearing on his federal violation of parole.

On April 19, 1977, shortly after making the above request, U.S. Marshals picked Bell up pursuant to a writ of habeas corpus ad prosequendum and brought him to the courthouse in the Eastern District of New York for an arraignment on the indictment in the instant case. (Hearing, pp. 123, 125). Bell arrived at the courthouse's holding pens at about 11:00 A.M. (Hearing, p. 126).

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At trial, the Government stipulated that "Mr. Bell was writted into Federal custody for the purpose of being arraigned." (Trial, p. 311).

Shortly after his arrival, Bell was met by Special Agent Mahaffey who brought Bell to the office of Assistant U.S. Attorney Zachary Carter. Bell was introduced to Mr. Carter who then left the room, leaving Bell alone with Agent Mahaffey. (Hearing, p. 113).

From approximately 11:20 A.M. to 12:30 P.M., Mahaffey interviewed Bell with regard to the charges in the indictment (this was the first Bell learned of the indictment and the first he realized he was not brought there on his hearing request),
*
advised Bell orally of his Miranda rights and with a "Waiver of Rights" form, explained the indictment and the charges, mentioned that Bell would be arraigned shortly, elicited a confession from Bell, reduced it to writing and had Bell initial the corrections and sign his name in the appropriate places. (Hearing, pp. 114, 115, 118, 126, 127; Trial, pp. 265, 313, 315).

At about 12:30 P.M., Bell was arraigned before Judge Bramwell and an attorney was assigned. (Trial, pp. 365-366). At 2:30 P.M., Bell was again brought before Judge Bramwell, this time his court-appointed attorney was present. (Hearing, p. 137).

At the trial, Bell's attorney made a Luck motion which

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Mahaffey repeated the rights to Bell a few times. On some of the repetitions, he failed to warn Bell that whatever Bell said would be used against him at trial. (Hearing, pp. 129, 134-135).

was denied. (Trial, pp. 6-13). The court also ruled that Bell's prior bank larceny conviction could be used as being probative of Bell's identity in the instant case. The Government indicated its intention to use Bell's prior convictions only with regard to credibility if Bell took the stand and not to establish identity or a common scheme or plan. (Trial, p. 6).

The Government offered no evidence of Bell's prior convictions on its case in chief. Bell took the stand in his own defense and his prior convictions were explored by his attorney as well as the Government.

In summations, the Government again refrained from using Bell's priors to establish identity or a common scheme or plan. The court, however, in its charge to the jurors, told them that they could consider Bell's prior bank larceny not only as to his credibility but also as proof regarding his identity in the instant case, if they felt that there was a similarity between that crime and the one charged here. The Government made no request for such a charge; Bell's attorney objected to that portion of the charge. (Trial, pp. 626, 633).

ARGUMENT

Point I

THE POST-INDICTMENT, PRE-ARRAIGNMENT
STATEMENT BY BELL WAS UNLAWFULLY OB-
TAINED AND ITS USE AT TRIAL WAS REVER-
SIBLE ERROR.

- A. BELL SHOULD HAVE BEEN ARRAIGNED PROMPTLY WHEN BROUGHT TO THE E.D.N.Y. COURTHOUSE RATHER THAN BEING DETOURED TO THE U.S. ATTORNEY'S OFFICE FOR INTERROGATION; AND UNDER THE CIRCUMSTANCES OF THIS INTERROGATION, ANY STATEMENTS MADE BY BELL, WHILE THEY COULD BE USED TO PROVIDE INFORMATION AGAINST CO-DEFENDANTS, THEY COULD NOT BE USED AGAINST BELL HIMSELF.

On April 19, 1977, at 11:00 A.M., Bell, already under indictment in the instant case, was brought to the courthouse for the Eastern District of New York pursuant to a writ of habeas corpus ad prosequendum. The writ required Bell's presence at 10:00 A.M., on the 19th of April, 1977, to be arraigned before Judge Bramwell. (Hearing, pp. 123-125).

Bell was in the courthouse for about an hour and a half before he was arraigned at 12:30 P.M. During that period of time, he was brought to the U.S. Attorney's office and questioned by Special Agent Mahaffey. Not only was this a contravention of the writ but it was an inexcusable delay because Judge Bramwell was in the building. And if Judge Bramwell was detained, then Bell could have and should have been promptly brought before another judge or magistrate for the arraignment.

Instead, Agent Mahaffey interrogated Bell. This interrogation accomplished two things: First, it resulted in a confession which considerably bolstered the Government's case; and second, it was done in a manner calculated to prevent Bell from having the advice of counsel before making such a statement.

At the trial, under questioning by the court, Agent Mahaffey conceded that it was his intention to question Bell and to seek a confession as well as cooperation and further knowledge of the case. (Trial, pp. 317-318, 327). The court felt the Government was obliged to bring Bell promptly before a judge or magistrate to be arraigned (Trial, p. 335) and even charged the jury to this effect (Trial, p. 637). The Government offered to consent to a mistrial when the court first raised this point, but the court declined this offer, saying it did not have the time to start over and saw no sense in retrying the case. (Trial, p. 343).

This attempt by the Government to shore up its case was understandable from the prosecution's point of view because the only meaningful evidence against Bell at that time was the statement of a crime-ridden accomplice, Curtis King, who agreed to testify for the Government. It is important to note here that in questioning Bell, the Government was not trying to solve the crime (Bell and his co-defendants were already indicted) nor was it trying to absolve any other suspects; the Government was specifically concerned with securing a statement from Bell in order to convict him. Under the circumstances of this case, interrogating Bell with such a purpose was improper and the resulting statement should have been suppressed. Spano v. New York, 360 U.S. 315, 323-324 (1959); United States v. Massimo,

432 F.2d 324, 327 (2d Cir.1970) (Friendly, J., dissenting), cert. denied, 400 U.S. 1022; United States v. Anderson, 523 F.2d 1192 (5th Cir.1975); see, United States v. Cookston, 379 F.Supp. 487 (W.D.Tex.1974).

If Bell were questioned for the purpose of obtaining evidence to use against others rather than himself, the procedure here would have been permissible. But in questioning Bell to obtain evidence against himself, the Government exceeded the constitutional limits of propriety.

This principle was stressed by the United States Supreme Court in Massiah v. United States, 377 U.S. 201 (1964). In that case, Mr. Justice Stewart, writing for the majority, stated,

We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

Id. at 207.

This principle was recently reaffirmed in this Circuit by Judge Knapp in the Southern District and Judge Smith in the Court of Appeals in excluding the statements of a de-

fendant and affirming that exclusion, respectively, in United States v. Satterfield, 417 F.Supp. 293,297,modified, 417 F.Supp. 303, at 'd, 558 F.2d 655 (2d Cir. 1966).

In the Spano case, supra, the defendant had already been indicted when the police interrogated him without counsel being present or notified. The circumstances there, analogous to this case as well, prompted Mr. Justice Douglas to write, in a concurring opinion, that:

This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel.

Id. at 325.

What makes this interrogation of Bell particularly abhorrent is that it was done in the courthouse, where he was brought to be arraigned, where judges and magistrates were available to arraign him (even if Judge Bramwell was detained) (see, Trial, p. 335), and where attorneys with the Legal Aid Society were available to represent him without delay at the interrogation (see, Trial, p. 316). Although the length of the delay is clearly within the permissible guidelines of 18 U.S.C.

§3501, the concern here is not with how much time was used, but with the manner and the circumstances in which that time was used. This is the "focal question" in the cases under the McNabb-Mallory rule^{*} and 18 U.S.C. §3501. United States v. Johnson, 467 F.2d 630, 636 (2d Cir.1972), cert. denied, 410 U.S. 932 and 413 U.S. 920.

A similar situation involving a defendant who was detoured to the U.S. Attorney's office when a commissioner was available to arraign him, prompted Judge Friendly to write in a concurring opinion that "if the matter were res nova in our court, I would find that the detour . . . was such 'unnecessary delay.'" United States v. Marrero, 450 F.2d 373, 379 (1971), cert. denied, 405 U.S. 933 (1972)^{**} ; see, United States v. Cookston, supra.

Whether the delay is considered "unnecessary" or not within the meaning of the McNabb-Mallory rule and 18 U.S.C. §3501, it was certainly improper and inexcusable under the circumstances herein. Furthermore, the circumstances surrounding the interrogation of Bell show clearly that the Government's intention was to shore up its case and to do so in a hurry, before counsel was appointed.

^{*} McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

^{**} But see, United States v. Ortega, 471 F.2d 1350, 1362 (2d Cir. 1972), cert. denied, 411 U.S. 948.

The following colloquy between Judge Mishler and Agent Mahaffey bears on this point (Trial, pp. 326-327):

Court: "If you knew he was going to be arraigned in a matter of minutes why didn't you wait until after the arraignment to interview him?"

Mahaffey: "No real reason . . . It's just been our practice and my own practice"

Court: "You might have experienced greater difficulty getting a statement from him after counsel was appointed; isn't that true?"

Mahaffey: "Possibly. I don't know."

B. BELL HAD AN ABSOLUTE RIGHT TO COUNSEL DURING HIS INTERROGATION; ANY WAIVER OF HIS RIGHT TO COUNSEL, WITHOUT THE ADVICE OF COUNSEL, UNDER THE CIRCUMSTANCES SURROUNDING THIS CASE, WAS A MEANINGLESS WAIVER.

In the Massiah case, supra, the Supreme Court held that incriminating statements obtained from an indicted defendant, free on bail, with retained counsel, deprived Massiah of his right to counsel under the Sixth Amendment and, accordingly, the Court reversed his conviction, saying his statements could not constitutionally be used against him at trial. In Massiah, the Court approvingly quoted from Spano v. New York, supra:

It was pointed out [in Spano] that under our system of justice the most elemental concepts of due process of law contemplate

that an indictment be followed by a trial, "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." 360 U.S., at 327 (Stewart, J., concurring). It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding.

377 U.S., at 204. The Court went on to stress the constitutional principle that to be without the protection of counsel under such circumstances violates the accused's rights:

"Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

Id., at 205 (quoting from People v. Waterman, 9 N.Y.2d 561,565).

It may be argued in this case that the Massiah rule is distinguishable from the circumstances herein because surreptitious conduct was involved in obtaining Massiah's statement, while in the instant case, Bell was straight-forwardly questioned by an agent who informed him of the indictment and advised him of his rights. This distinction, however, is inappropriate. The Supreme Court, this year, pointed out

That the incriminating statements were elicited surreptitiously in the Massiah

case . . . is constitutionally irrelevant. [Citations omitted] Rather the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.

Brewer v. Williams, ___ U.S. ___, 97 S.Ct. 1232, 1240 (1977); United States ex rel. Lopez v. Zelker, 344 F.Supp. 1050, 1054 (S.D.N.Y.1972), aff'd, 465 F.2d 1405 (2d Cir.), cert. denied, 409 U.S. 1049; United States v. Satterfield, supra; United States v. Garcia, 377 F.2d 321, 324 (2d Cir.1967).

Massiah was not the only case to specify the existence of an indictment as touching off the accused's absolute right to counsel. Referring once again to Brewer:

Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him - "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois [406 U.S. 682, 689; other citations omitted].

97 S.Ct., supra, at 1239; United States ex rel. O'Connor v. New Jersey, 405 F.2d 632, 636 (3d Cir.1969), cert. denied 395 U.S. 923; United States v. Satterfield, 558 F.2d, supra, at 656-657; Spano v. New York, 315 U.S., supra, at 327 (Stewart, J., concurring).

When this right to counsel is denied to the indicted

defendant, the use of his statement at trial must be suppressed. United States v. Massiah, 377 U.S., supra, at 205; United States v. Satterfield, supra; United States v. Massimo, 432 F.2d, supra, at 327 (Friendly, J., dissenting).

While it may be true that in a federal criminal prosecution, an indicted defendant may waive his or her right to counsel during an interrogation, such a waiver should require all the procedural safeguards attending the waiver of counsel in open court. United States v. Satterfield, 417 F.Supp., supra, at 297; United States ex rel. Lopez v. Zelker, 344 F.Supp., supra, at 1054.

In Zelker, the court quotes from the dissenting opinion of Judge Breitel in People v. Lopez, 28 N.Y.2d 23, 28-29, 268 N.E.2d 628, 631, 319 N.Y.S.2d 825, 829 (1971), cert. denied, 404 U.S. 840, saying that Judge Breitel's conclusion "must be adopted as a matter of federal constitutional law,"

Whatever vitality a waiver rule might have under the Miranda doctrine, other considerations required a contrary rule in the area of postarraignment and postindictment interrogation. After criminal action is begun, it is no longer a general inquiry into an unsolved crime but rather a form of pretrial discovery; it is no longer a suspect who is being interrogated but the accused; the interest in affording the police an opportunity to carry on investigatory interrogation for purposes of reaching a decision to charge and in what degree is diminished. In short, the defendant

is the all but irrevocable target and the preparation for his trial has begun.

344 F.Supp., supra, at 1053-1054.

Under these circumstances, where the waiver of the right to counsel is so strongly protected, the New York example should once again be followed. In New York, the actual presence of counsel is required before an indicted defendant can intelligently waive his or her right to counsel. People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976). The rationale here is simple and flows from the cases previously cited: Any waiver of counsel by an indicted defendant is meaningless and cannot be an intelligently made decision without counsel being actually present to advise the defendant in this regard.

C. THE GOVERNMENT FAILED TO MEET ITS "HEAVY BURDEN" IN PROVING A WAIVER OF RIGHTS.

Regardless of whether this court adopts the New York rule discussed above (that is, counsel must be initially present in order to effectively and intelligently waive the right to counsel), the defendant's waiver of the right to counsel must be found to have been invalid in this case. This is due to the

Government's failure to meet its "heavy burden" of proving that Bell voluntarily waived his rights.

In considering the waiver of the Sixth Amendment's right to counsel, a higher standard applies to assessing "voluntariness." United States v. Satterfield, 558 F.2d, supra, at 657; United States v. Jakakas, 423 F.Supp. 564, 568 (E.D.N.Y. 1976).

As the court said in Zelker, 344 F.Supp., supra, at 1054:

When an indictment has come down, riveting tightly the critical right to counsel, a waiver of that right requires the clearest and most explicit explanation and understanding of what is being given up

It has been held that the right to counsel does not even depend upon a request by the defendant. Brewer v. Williams, 97 S.Ct., supra, at 1242. And courts are not only concerned with the blatantly offensive methods of interrogation:

. . . as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.

Spano v. New York, 360 U.S., supra, at 321.

The rationale for the application of this higher standard, this "heavy burden" upon the Government, is stated in Satterfield, 417 F.Supp., supra, at 296:

. . . it comports with the realities of life. Prior to indictment - before the prosecution has taken shape - there may be may [sic] reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him after a grand jury has spoken. At that point he cannot make any arrangements with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it.

Thus, whether adopting the New York rule or otherwise, the waiver here was invalid.

Point II

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT IT COULD CONSIDER DEFENDANT BELL'S PRIOR BANK LARCENY WITH REGARD TO PROVING BELL'S IDENTITY IN THE INSTANT CASE.

It is conceded that the Government may introduce evidence of other crimes committed by the defendant on its case in chief, unless such evidence is introduced solely to show the

defendant's criminal character and provided that the probative worth of such evidence outweighs its potential prejudice.

United States v. Torres, 519 F.2d 723 (2d Cir.1975), cert. denied, 423 U.S. 1019; United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971).

The evidence of other crimes, however, should involve a modus operandi which is "sufficiently unique to point to the defendant as the perpetrator of the crime charged " Richardson, On Evidence, §180 (10th ed.1973).

Furthermore,

. . . it is error to admit evidence of a defendant's prior criminal conduct, other than to impeach his credibility as a witness, where it is not introduced to show a common scheme. [Emphasis supplied]

United States v. Panepinto, 430 F.2d 613, 616 (3d Cir. 1970), cert. denied, 400 U.S. 949.

In Bell's case, the evidence of his prior bank larceny conviction was not introduced on the Government's case in chief; it was brought out for impeachment purposes only on the defendant's case. And the Government failed to argue to the jury that Bell's prior conviction could be considered as proof of his commission of the instant charges. In fact, as pointed out in the "Statement of Facts," the Government expressly said to the court, during argument of the Luck motion, ". . . while it could be argued, I do not care to argue that it would establish identity for a common scheme and plan." (Trial, p. 6).

Under these circumstances, the use of Bell's prior conviction could have and should have only been used with regard to his credibility. Yet, the court chose to instruct the jurors that they could consider Bell's prior conviction as evidence as to identity.

In effect, the court unwittingly donned the hat of the prosecutor and chose to introduce into the case against Bell an evidentiary consideration expressly rejected by the Government. This goes beyond an abuse of discretion since it was not a matter for the court's discretion in the first place.

Point III

BOTH OF THE PRECEEDING POINTS CONSTITUTE
REVERSIBLE ERROR.

The error in allowing Bell's statements to enter his trial caused immeasurable damage to Bell's defense. The following language from Mr. Justice Douglas's concurring opinion in Spano v. New York, 360 U.S., supra, at 325, underscores this point:

Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.

And when a defendant is, "deprived of that right after indict-

ment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him." Id., at 326. Justice Douglas then concluded by asking, "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Id.

If Bell's statement had been suppressed, then Bell would not have had to take the stand to explain his statement; his prior record would not have been made known to the jury for impeachment purposes; he would not have been tried with his co-defendant, Graham, whose statement inculcating himself and Bell was introduced at trial; and the only substantial evidence remaining in the case against Bell would be the testimony of the accomplice, King, whose criminal background filled five pages of transcript on direct testimony alone (Trial, pp. 49-54).

In addition, if the court had not charged the jury to consider Bell's prior conviction as probative on the question of identity, then the identity question is difficult to resolve, the prejudice to Bell is greatly reduced and reliance on the accomplice's testimony is increased.

Each of these errors is enough to have made the difference between a conviction and an acquittal; each is likely

to have affected the result. See, United States v. Duval, 537 F.2d 15 (2d Cir.1976).

With the inclusion of both errors in the case, the prejudicial effect of either one becomes compounded by the other. Accordingly, the errors here cannot be said to be harmless.

CONCLUSION

For the reasons stated, the conviction should be reversed, the statements suppressed, the charge corrected, and a new trial ordered.

Respectfully submitted,

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